Case Name: Herod Property Ltd, R (On the Application Of) v Westminster City Council [2026] EWHC 2122 (Admin) (11 August 2026)

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Commentary: The case concerned an application to quash the decision of Westminster City Council to require payment of CIL in relation to a development where it was claimed that the in-use deduction reduced the CIL liability to zero. The application was dismissed.

An office building had been converted to five residential flats pursuant to permitted development ("PD") rights following receipt of prior approval. Development carried out under PD rights is liable to CIL. However, the developer was relying on the "in-use" deduction under regulation 40 and Schedule 1 and had therefore calculated that no CIL was due.

The in-use deduction allows for floorspace that has been in lawful use for at least a six month period during the three year period prior to the date that planning permission first permits development. For permitted development this is the day on which the collecting authority ("CA") receives a notice of chargeable development in accordance with Regulation 64. If a notice is not received, it is the date on which the CA serves a notice under Regulation 64A.

Regulation 64 applies where planning permission is granted for development by a general consent (i.e. permitted development). Regulation 64(2) requires that a notice of chargeable development is submitted prior to commencement of development. However, Regulation 64(1A)(b) provides that this does not apply where the chargeable amount is zero. In this case the developer did not submit a notice of chargeable development.

However, Regulation 64A provides that if the CA is of the view that development has commenced and that neither of the listed exemptions apply (Regulation 42 where the GIA increase is less than 100 square meters and the exemption for residential extensions if it reduces the CIL liability to zero), the CA should prepare and serve a notice of chargeable development. The in-use deduction is not listed as an exemption in Regulation 64A.

In this case, Westminster City Council became aware of the development some years after the works and served a notice under Regulation 64A in August 2025. This meant that the three year time period for the purpose of the in-use deduction ran from August 2022. While the Council had evidence that some of the flats had been sold and occupied, the Council did not consider that it had sufficient evidence of the duration and nature of the occupation for the purposes of the in-use deduction.

The Court held that the Council's officers were not required to carry out extensive investigations particularly as the developer had not taken the opportunity prior to carrying out the development to provide evidence to the Council, despite two earlier written warnings from the Council about the need to engage with the CIL process (even though the correspondence had been sent to the claimant's agent and not been passed on – this was a matter between the claimant and their agent).

While the Court confirmed that it is not mandatory for a developer to submit a notice pursuant to Regulation 64 if it considers that the zero CIL exception applies, the judgment continues "*in my judgment a developer who decides not to serve a notice, in reliance on the zero CIL exception, takes certain risks if it does so without first satisfying the collecting authority that the in-use exemption does indeed or will indeed produce zero CIL. The collecting authority is in no way bound by the developer's decision that the in-use exemption produces zero CIL. Indeed, it is bound under regulation 64A itself to serve a notice of chargeable development, which some might think tends to indicate the contrary….*

The developer's view that no CIL is due may turn out to be wrong. If it has commenced the development, it loses important review and appeal rights. The collecting authority must act reasonably in the normal public law sense, but the powers it may properly exercise include deeming powers where there are gaps in its knowledge."

The deeming powers in Schedule 1 concerning the in-use exemption at paragraph 1(8) and (9) apply if the CA lacks sufficient information or information of sufficient quality, it may deem a relevant building not to be an in-use building (paragraph 1(8)) or deem the gross internal area of the relevant part to be zero (so that there is no deduction (paragraph 1(9)).

In light of these deeming provisions, the judgment sets out that "*the prudent course for a developer in the claimant's position, who is confident that the in-use exemption will produce zero CIL, is:*

> *(1) to check with the collecting authority, before commencing development, that on the basis of the developer's submitted plans, the authority agrees that the CIL payable will be zero, due to the in-use exemption;*
>
> *(2) if the authority does not agree, without obligation and voluntarily, to submit a notice of chargeable development, accompanied by a clear statement that the developer relies on the in-use exemption and says that CIL will be zero;*
>
> *(3) to submit with that notice a plan (see regulation 64(4)(b)) to make good the case for zero CIL under the in-use exemption ("any building … relevant for the purpose of calculating E or KR under regulation 40 and Schedule 1…");*
>
> *(4) to proffer any further information, documents or materials which, under regulation 64(8), the authority may consider relevant to assist it in confirming that the CIL payable on commencement will be zero;*
>
> *(5) to include with the notice the anticipated commencement date and confirmation that a commencement notice under regulation 67 will be submitted before that date;*
>
> *(6) to elicit from the authority, if possible before commencing the development, written confirmation that the authority agrees, on the basis of the information it has, that no CIL will be payable;*
>
> *(7) if the development has not yet commenced and that agreement is not forthcoming, to seek a liability notice stating the CIL said to be due and to seek a review of that determination and if necessary to bring an appeal; and*
>
> *(8) if for good reason the developer urgently needs to commence the development without the comfort of a zero CIL determination, to explain to the authority why this is so and to reserve its rights, exceptionally, to bring a judicial review should the authority seek any CIL."*

The claimant had also argued that the CIL charge should have been apportioned to include the long leaseholders of the flats. However, the liability to pay CIL crystallises on commencement of development and the claimant's interest was the only known interest in the land at that time. The Court agreed that there was no basis for transferring the crystallised liability to a person who had later acquired a material interest in the land. The judgment held that "*There is nothing unfair or inequitable about that result. It places responsibility for paying CIL on the party likely to benefit from the development*."

The fact that the liability notice mistakenly referred to TfL instead of the Mayor of London was not a material error and had no prejudicial impact on the claimant.

Finally, the judge concluded that the claim for judicial review would have been dismissed anyway on the ground that the claimant had a suitable and adequate alternative remedy by way of the review and appeal rights under regulations 113 and 114. Although these rights had been lost on commencement, there was no evidence that the claimant was under time pressure to commence the development so that it would not have had time to exercise review and appeal rights between the receipt of prior approval and the date of commencement of development.

Conclusion

Where works, including a change of use, are carried out pursuant to permitted development rights, the development will be potentially liable for CIL. If the in-use deduction is sought to be relied on to reduce the CIL liability to zero, it is important to take steps to reach agreement with the collecting authority as to the availability of the exemption prior to commencement of development. Without this, the developer will lose the opportunity to submit evidence and to appeal the authority's decision and therefore risks being liable for the full quantum of CIL.

In the case of a time-limited permitted development right, this process should begin as promptly as possible to ensure that there is time to apply for review or appeal prior to commencement of development in cases where agreement is not reached with the Council. The judgment helpfully sets out a prudent sequence of actions. Developers should ensure that they have sufficient evidence of the relevant lawful use for at least the six month period during the three year period prior to the relevant date (service of the notice of chargeable development). Developers should therefore not take the apparent exemption to submitting a notice of chargeable development at Regulation 64(1A) at face value, particularly as this means that the timing point for the three year period for the in-use deduction will be set by the date on which the Council serves a notice under regulation 64A.

Case summary prepared by Susannah Herbert